



Memorandum

To : Mr. Assessment Standards Division

Date : February 14, 1991

From : Mr. Eric F. Eisenlauer
Tax Counsel

Subject: Section 66 of the Revenue and Taxation Code and IRA's

This is in response to your memorandum of January 10, 1991 to Mr. [redacted] in which you request a legal opinion with respect to the following facts provided by the Shasta County Assessor.

In May 1985, a corporation transferred real property into an employee retirement plan. At that time, the corporation was wholly owned by two individuals, each having a 50 percent interest in the corporation. The two shareholders were the only beneficiaries of the retirement plan and held equal interests in it.

The assessor excluded the transfer from reappraisal under Revenue and Taxation Code* section 66. The assessor also states that since the proportional ownership interests in the real property were maintained, the transfer also would have been excluded from change in ownership under section 62(a)(2).

In May 1990, the corporation's employee retirement plan transferred the real property by two grant deeds to the trustees of two Individual Retirement Accounts ("IRA's") held by the two shareholders. One conveyance was of a 54.84 percent tenancy in common interest, and the other conveyance was of a 45.16 percent tenancy in common interest.

Based on the foregoing facts, you first ask whether an IRA qualifies as an employee benefit plan as described in section 66.

Section 66 provides in relevant part that change in ownership shall not include any of the following:

- (a) The creation, vesting, transfer, distribution or termination of a participant's or beneficiary's interest in an employee benefit plan.

* All subsequent statutory references are to the Revenue and Taxation Code unless otherwise indicated.

- (b) Any contribution of real property to an employee benefit plan.

. . .

As used in this section, the terms "employer," "employee benefit plan," "participant" and "beneficiary" shall be defined as they are defined in The Employee Retirement Income Security Act of 1974.

Property Tax Rule 462(m) (Title 18 Cal. Code Regs.) provides in relevant part that the following transfers do not constitute a change in ownership:

. . .

- (4) Any contribution of real property to an employee benefit plan or the creation, vesting, transfer, distribution or termination of a participant's or beneficiary's interest in such a plan. The terms used herein shall have the meaning ascribed to them in the Employee Retirement Income Security Act of 1974, which is codified as United States Code annotated, Title 29, Section 1002. (The term "any contribution" as used in section 66(b) of the Revenue and Taxation Code and this section means only those original contributions of real property made to an employee benefit plan by an employer, a group of employees, or both, without any consideration.)

The term "employee benefit plan" is defined in 29 U.S.C.A. 1002(3) as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

Both an employee welfare benefit plan and an employee pension benefit plan require that such plan "was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both . . ." (29 U.S.C.A. section 1002(1)(2)(A).)

The term "employer" is defined as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." (29 U.S.C.A. section 1002(5).)

The term "employee organization" is defined as "any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or

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in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose, in whole or in part, of establishing such a plan." (29 U.S.C.A. section 1002(4).)

Under the foregoing provisions, an employee benefit plan for purposes of section 66, must be established or maintained by an employer or employee organization, and not by an individual employee. IRA's, however, were designed by Congress to stimulate savings by employees not covered by qualified plans of their employers (2 Bittker and Lokken, Federal Taxation of Income, Estates and Gifts (2d Edition 1990) §62.3.1 p. 62-39) and by their nature are established and maintained by an individual employee. Accordingly, we are of the opinion that an IRA is not an employee benefit plan for purposes of section 66. Section 66(b), therefore, would not apply to the transfer in question.

Moreover, Rule 462(m) provides that any contribution of real property to an employee benefit plan under section 66(b) "means only those original contributions of real property made to an employee benefit plan by an employer, a group of employees or both . . ." . Thus, even if the IRA's were considered to be employee benefit plans for purposes of section 66, the transfer of real property to such IRAs would not be excluded under section 66(b) because it was made by the corporation's employee retirement plan and not made by either an employer or a group of employees.

Since the facts provided do not indicate that section 66(a) is applicable, we assume for purposes of this letter that section 66(a) does not apply.

You also ask whether the "proportional interest" rule of section 62(a)(2) applies to the transfer to the IRA accounts and if not, whether it is necessary to track the current ownership interests.

Inasmuch as the subject real property was transferred to the trustees of two IRAs, it is necessary to consider the applicability of the rules regarding trusts.

Property Tax Rule 462(i) provides in relevant part:

- (1) Creation. Except as is otherwise provided in subdivision (2) the transfer by the trustor, or any other person, of real property into a trust is a change in ownership of such property at the time of the transfer.
- (2) Exceptions. A transfer to a trust is not a change in ownership upon the creation of or transfer to a trust if:

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- (A) Trustor-Transferor Beneficiary Trusts. The trustor-transferor is the sole present beneficiary of the trust; provided, however, a change in ownership of trust property does occur to the extent that persons other than the trustor-transferor are present beneficiaries of the trust.
- (B) Revocable Trusts. The transfer of real property or an ownership interest(s) in a legal entity by the trustor(s) to a trust which is revocable by the trustor(s); provided, however, a change in ownership does occur at the time the revocable trust becomes irrevocable unless the trustor-transferor remains or becomes the sole present beneficiary.
- (C) Trustor Reversion Trusts. The trustor-transferor retains the reversion, and the beneficial interest(s) of person(s) other than the trustor-transferor does not exceed 12 years in duration.
- (D) Interspousal Trusts. The exemption afforded interspousal transfers is applicable; provided, however, a change in ownership of trust property does occur to the extent that persons other than the trustor-transferor's spouse are beneficiaries of the trust.
- (E) Proportional Interests. The transfer is to a trust which results in the proportional interests of the beneficiaries in the property remaining the same before and after the transfer.
- (F) Other Trusts. The transfer is from one trust to another and meets the requirements of (A), (B), (C), (D) or (E).

Under Rule 462(i)(1) set forth above, a transfer to a trust is a change in ownership unless an exception applies under (2)(A-F) of the rule. The only possible exception here appears to be the proportional interest exception under (2)(E) which reflects the Board's interpretation of section 62(a). From the information provided, however, it appears that the proportional ownership interests held by the shareholders in the real property through the corporation's retirement plan were equal prior to the transfer to the IRA trustees and unequal after such transfer. If so, the (2)(E) exception does not apply and the transfer to the IRA trustees was a change in ownership.

With respect to your question regarding the necessity to track the current ownership interests, we assume you are talking about the

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corporate stock. As you know, section 64(d) provides that if property is transferred on or after March 1, 1975 to a legal entity in a transaction excluded from change in ownership by section 62(a)(2), the persons holding ownership interests in such legal entity immediately after the transfer shall be considered "original co-owners". Section 64(d) further provides that a change in ownership of the property excluded by section 62(a) occurs whenever ownership interests (e.g., corporate stock) representing cumulatively more than 50 percent of the total interests in the entity are transferred by any of the original co-owners in one or more transactions. In this case, there is nothing to indicate that there was a transfer to the corporation which was excluded from change in ownership under section 62(a)(2). Accordingly, there are no original co-owners of the stock in the corporation and thus no need to track it.

Also, there are certain transfers which are excluded under section 62(a)(2) which do not require that ownership interests be tracked for purposes of section 64(d). For example, where a corporation is liquidated and transfers its real property to its shareholders as tenants in common in the same proportion as the share ownership, the transfer is excluded under section 62(a)(2) but there are no ownership interests in the corporation to be tracked for purposes of section 64(d). In our view, the same is true with respect to a transfer of real property to a trustee of an IRA which is excluded under section 62(a)(2) since an individual is the beneficial owner of the property and ownership interests in a legal entity, for purposes of section 64(d), would not exist.

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cc: Mr. John W. Hagerty